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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 805

WM. FRASER ET UX., Petitioners
VS.
P. M. BARTON ET AL., Respondents

REPLY OF PETITIONERS TO THE OPPOSITION BRIEF OF RESPONDENTS, P. M. BARTON ET AL

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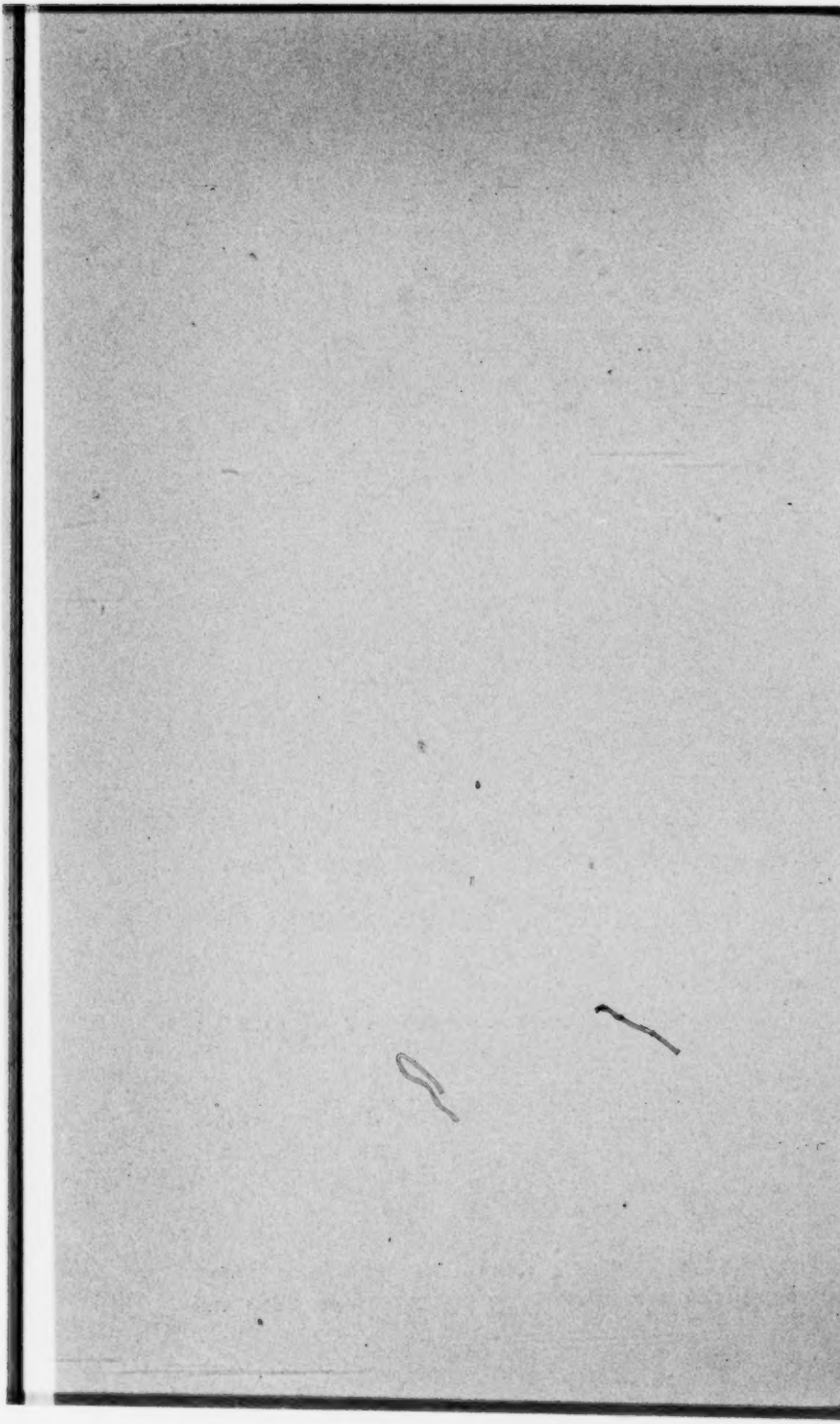
THE DAILY NEWS



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TO THE HONORABLE JUDGES OF THE SUPREME COURT:

Petitioners feel that a brief rebuttal argument will be of aid to the Court in reaching the real issues involved.

ESTOPPEL

The estoppel invoked against respondents is based upon a deliberate and purposeful change of the basis and

theory of their suit, made for the specific purpose of casting petitioner, Wm. Fraser, in the role of "first purchaser" of the cotton, an essential step in fastening on him liability for the collection of the tax.

The Three-Way Land Co. desired to step out of its role as first purchaser, and to further this purpose, a radical change in the parties to the litigation occurred. All this will appear from a brief history of the litigation.

1. In Missouri, Circuit Court of Madrid County, May 22, 1942, The Three-Way Land Co., the corporation, sued Fraser claiming that Fraser had sold the cotton for the corporation, and owed it $88,325, the proceeds less the loan.

R. 197-199.

"Title to the proceeds of the cotton in question was still in the corporation—"

Findings of Fact. R. 149.

2. In the United States District Court at Memphis, Nov. 17, 1942, P. M. Barton filed suit for The Three-Way Land Co., and its three stockholders, and for some 60 odd sharecroppers, or tenant farmers, in whom, it is now alleged, reposed title to Three-Fourths of the cotton.

R. 3.

3. If the title to that Three-Fourths interest was in the corporation, this meant that the corporation was the first purchaser from the growers, the tenants. So, to avoid the role of first purchaser, it was necessary to make the radical change in parties to the suit.

The mere fact that the corporation had surrendered its charter in July of 1942, was no reason why the cor-

poration could not have maintained the suit in its own name; because corporate existence continues for the purpose of winding up unfinished business, realizing and collecting assets, and ceases only so far as new business is concerned. Such was not the real reason for the change.

Note the confusion created in the minds of counsel and of the court. R. 592-595.

4. In the Missouri suit, and in the Memphis suit, and also in the intervening suit filed by the Government, the basic theory is that Fraser was a selling agent, and had sold the cotton for plaintiffs and had not accounted for the proceeds. R. 3-19.

There is nothing said in these pleadings about Fraser being a purchaser of the cotton, or owing the Government the tax because he purchased the cotton.

The stipulation leaves open the question of whether the transaction was one of selling agency, or outright sale of Fraser.

R. 108.

Fraser in his answer claims he was an outright purchaser, from the corporation, and from no one else; he knew no one else in the deal. See Stip. R. 106, Par. II of Stip.

Respondents through their counsel, Mr. Callahan, make concessions:

> "MR. CALLAHAN: They are probably the buyers of the cotton outright." R. 584.
>
> "THE COURT: You admit that they **bought** the cotton?
>
> "MR. CALLAHAN: **We can't deny it and we admit that they bought the cotton.** R. 537

"MR. CALLAHAN: That, your Honor, is the entire lawsuit. Just what the contract amounts to is that Britton (and Fraser) was to pay the tax either as the **first buyer** or the **second buyer.** We are bound to concede that he must be **the first buyer.** If he is, it is our contention that he is the collector of the tax." R. 539.

5. The reason for this radical change in the theory of respondents as plaintiffs in the suit, is that the corporation, which had sold this cotton to Fraser, is backing away from its situation as "first purchaser" of the cotton.

But this does not work because of the facts. The corporation owned title to the cotton, and sold same to Fraser. But the corporation was not the grower, nor original owner, but itself had purchased the cotton, and owed the tax, as first purchaser, and though it had made a practice of paying the tax to the Government, it decided to do otherwise for the year 1941, because the tax had advanced from 3 to 7 cents a pound, and this corporation was not paying the tax on any 1941 cotton, but was interested in a suit being brought to contest the legality of the advance of 4 cents a pound. All these matters clearly appear in the record, which we quote:

Testimony of P. M. Barton:

"A. I wasn't the producer. I didn't produce any of that cotton.

Q. You were the land-owner. You owned the land?

A. The land was rented out.

Q. You were the original owner of the cotton?

A. NO SIR, the land was rented out to tenants."
R. 599.

"A. The way we handled that in the gin business when we would buy cotton we would make a report every 15 days to the Government of the cotton we had purchased and who we bought it from and whether it was red or white card cotton and at the end of the season—I have never had a buyer question me about the tax—when we wound the gin season up we know the amount of tax on the cotton that we have bought. When we buy red card cotton we collect the tax against it. At the end of the season we figure up on all of the cotton we have bought and settle up with the United States Treasury Department for the tax.

* * * * *

Q. And you paid the tax on all penalty cotton you have handled or produced?

A. All except in 1941.

Q. You mean the Fraser cotton?

A. No, sir.

Q. The cotton involved here?

A. No sir, in 1941.

Q. Go ahead?

A. A bunch of farmers in Southeast Missouri—cotton was taxed by Congress four cents after the cotton was up and planted. Some 75 or 150 farmers—in fact I talked to you about it—they wanted to contest the four cents or let the Government sue someone, and we put that money in escrow."

R. 613-614.

This corporation kept all the red cards, the identification tags of penalty cotton.

> "Q. Did you have this red card with you at the time you made these deals with Mr. Fraser?
>
> A. The red cards were in the office at the time, Mr. Fraser was up there. We had a stack of them that high, because we have to settle—at the end of the season we keep them to know how much to pay."

The corporation kept these red cards and did not deliver to Fraser. See Findings of Fact.

> "P. M. Barton, acting in the capacity aforesaid, did not identify any of the cotton as being subject to marketing penalty even though red marketing cards for the farms upon which the excess cotton involved in this case was produced were duly issued by the appropriate county committee, and P. M. Barton had possession of, and full control over, such cards at the time of the sale of the cotton by him."
>
> Findings of Fact. R. 153.

Fraser bought from the corporation, and no one else, and the suit should have been filed by the corporation as sole plaintiff. But instead of such a straightforward suit, the action becomes distorted to this theory, that the 60 odd sharecroppers as plaintiffs sold cotton to Fraser and are entitled to a judgment against him. This distortion results in an impractical kind of a judgment against Fraser, one which, should he now decide to pay off, he would have great difficulty in knowing just whom he owed, and how much, or even in locating these plaintiffs whom he never saw.

> "It is further considered ordered and adjudged by the Court that the plaitiffs have and recover of and from the defendants G. H. Britton and William Fraser, individually and as partners under the firm name and style of G. H. Britton Cotton Company, jointly and severally, the sum of $12,971.00, being the aggregate of the agreed sale price of the equities in 1853 bales of cotton herein involved at the rate of $7.00 per bale; said plaintiffs' interest in said judgment and any sums paid thereon being in accordance with and in proportion to their respective interests in the cotton herein involved and as set forth in the stipulation of Facts filed herein."
>
> See Judgment. R. 166-7, Par. VI.

Why all this complication and confusion and an unwieldy host of plaintiffs?

Simply, that the corporation wants to delete the fact that it had become the first purchaser of the cotton, and to cast that robe upon the shoulders of Fraser. There is no hesitancy in redesigning the entire action, from change of parties to change of theories, in order to further this purpose.

We submit that such trifling with the courts is the basis for the very strongest kind of estoppel.

CONCLUSION.

In conclusion may we again remind the Court of the simplicity of Fraser's defense in the suit. It is that he bought cotton from the corporation at a certain price, all as shown in the letters written to, and acted on by Barton (Pet. 7-8), who could at any time have stopped delivery; that Barton enticed Fraser to Missouri and

brought suit, and when litigation began Fraser stood still, holding the proceeds he had, such as were not taken from him by court order, awaiting the termination of the litigation.

While maintaining this straightforward and simple defense, he has suffered continuous abuse and denunciation which characterizes respondents' brief in this Honorable Court. He, and his wife, have suffered the impact of supposed powers in the District Court to make mandatory orders.

Petitioner made a simple straightforward contract with the corporation. He has always been willing to carry that contract out in letter and spirit.

Respectfully submitted,

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